NO. 92-1720

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Lawrence J. Brady, Barbara A. Brady, Deborah R. Labovitz, and Judah I. Labovitz,

Petitioners,

v.

The State of New York, Mario Cuomo, and James Wetzler,

Respondents.

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND NEW HAMPSHIRE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

A. PRELIMINARY STATEMENT

The effect of the provisions of the New York Tax Law which the New York Court of Appeals has upheld is to require married Pennsylvania residents who work in New York and file joint federal tax returns to pay New York income tax not only on the income they earned in New York but also on their spouse's income -- even if the spouse resides and works in Pennsylvania and has no New York source income. This law violates the rights of due process and equal protection of Pennsylvania citizens who work in New York and their spouses for the reasons described in the Petition for Writ of Certiorari. New York's constitutional error is founded in great part on its

illegitimate assumption that a married couple residing in another state is willing to be treated as a single taxable unit for all purposes simply because they filed a joint federal return.

The New York law also erodes Pennsylvania's ability as a sovereign state to tax incomes earned by its residents within its borders. This result occurs both because Pennsylvania allows a limited income tax credit for income taxes paid to other states and because New York's cross-border tax diminishes the resources of Pennsylvania residents to support their own state's and local communities' tax efforts necessary to provide services to Pennsylvania

residents.[1]

The New York law is not an isolated example of this brand of extraterritorial tax policy. Ohio already has a tax law which emulates that of New York and, therefore, adversely affects Pennsylvanians who work in Ohio. Moreover, based on the New York precedent, other states bordering Pennsylvania may well be tempted to enact tax laws modeled after the New York law. According to the petitioners, New Jersey is even now

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[1]Approximately 29,000 Pennsylvanians have incomes derived from New York sources and, thus, are liable to pay income tax to New York. When a Pennsylvanian pays income tax to New York, the Commonwealth of Pennsylvania (like most other states), in turn and in fairness to its citizens, allows a credit against the income tax which would otherwise be due to Pennsylvania on that New York income. See Pa. Stat. Ann. tit. 72, §7314 (Purdon 1990); 61 Pa. Code §§111.3 - 111.5.

actively considering retaliation for New York's law. See Pet. for Writ of Cert., at 23-24 (quoting State Tax Notes 708 (Mar. 29, 1993)). Regardless of its motivation, however, such retaliation by New Jersey would skewer both residents of New York and Pennsylvania who work in New Jersey.

B. IMPACT OF NEW YORK TAX LAW ON PENNSYLVANIA

1. Pennsylvania Tax Law

When a resident of one state earns income in another, the state providing the income is entitled, consistent with due process under the United States Constitution, to receive payment for the benefits, protections and opportunities provided to the cross-state commuter.

Thus, when a New York resident earns income in Pennsylvania, Pennsylvania is entitled to receive from the New York commuter a fair share of his income, through taxation, as compensation for the services, opportunities, protections and benefits he receives by virtue of his employment in Pennsylvania. Consistent with the limits of due process, Pennsylvania imposes under its Tax Reform Code of 1971[2] a tax upon a nonresident, at a rate of 2.8 percent, on "that part of his income derived from sources within [Pennsylvania]." Pa. Stat. Ann. tit. 72, §§7302(b)(2), 7308 (Purdon 1990 & Supp. 1992) (emphasis added). However, also consistent with the requirements of due process, any income a resident of New York

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[2] Act of March 4, 1971 (P.L. 6, No. 2), as amended, Pa. Stat. Ann. tit. 72, §§7101-10004 (Purdon 1990 & Supp. 1992).

or any other state might earn outside of Pennsylvania is entirely excluded from taxation by Pennsylvania or from consideration in the computation of Pennsylvania income tax liability.

Some residents of New York and other states who earn income in Pennsylvania are married to a spouse who also earns income in Pennsylvania. For those couples -- both of whom are subject to Pennsylvania's tax of 2.8 percent on their respective incomes derived from sources in Pennsylvania -- Pennsylvania provides an option. The couple may, if they elect to do so, file a single joint return and determine a joint taxable income for which both spouses are jointly and severally liable. Id., §§7309, 7331 (Purdon 1990). However, if a nonresident should choose to file a return only for himself, then his

income from sources within Pennsylvania would be determined separately from the income of his spouse; and the taxpayer's income tax liability would be deemed to be the separate and individual liability of that taxpayer without regard to his spouse's income. Id., §§7309(a), 7331(a); 61 Pa. Code §117.2(a). These options, provided to all nonresident Pennsylvania taxpayers, are the same options Pennsylvania accords to its own citizens. Indeed, Pennsylvania recognizes, as a matter of its constitution, that couples in a marriage are not a single economic entity but individuals with an independent social, economic and legal status. See Denoncourt v. State Ethics Commission, 504 Pa. 191, 420 A.2d 945 (1983); Estate of Grossman, 486 Pa. 460, 406 A.2d 726 (1979).

Consistent with due process under the United States Constitution, no person from New York or any other state who derives income from Pennsylvania is required to report or to pay tax to Pennsylvania based on income that is derived from New York or any other state. Consistent with both due process and fundamental principles of privacy, Pennsylvania also does not require a nonresident taxpayer to report to Pennsylvania his or her spouse's income or to pay income tax based upon his or her spouse's income. Thus, Pennsylvania recognizes that, consistent with due process, New York residents who derive income from Pennsylvania may fairly be taxed based solely upon the income which they individually earn in Pennsylvania or derive from Pennsylvania sources.

These rules under Pennsylvania's Tax

Reform Act and implementing regulations are based upon three important governing principles:

> (1) Respect for the sovereignty of New York and other states and their primary authority to impose income taxes on their own residents without undue overreaching by Pennsylvania.
>
> (2) Respect for the exclusive rights of other states to establish the legal rules governing the economic relationships between married couples domiciled in that state and, to the extent not determined by another state's law, respect for the privacy and independence of the partners to a marriage to choose the rules of their own relationship, including those affecting their financial dealings between each other and with the government;

and

(3) Imposition of taxes on only that portion of income which "bears fiscal relation to the protections, opportunities and benefits given by the state," consistent with due process. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

2. New York Tax Law

Under TRARA, New York has seriously invaded Pennsylvania's and other states' important interests and prerogatives as sister states. First, New York has improperly invaded the taxing prerogatives of Pennsylvania and other states. When New York imposes additional taxes on Pennsylvanians and other nonresidents

beyond those which fairly reflect the services, protections and opportunities provided to nonresidents by New York, New York takes directly from Pennsylvania and other states important revenue upon which those states depend to provide services and protections to their own citizens. New York's tax, therefore, harms Pennsylvania and other states directly when it overreaches the borders by depriving the other state of income tax revenue.

Equally important, the new tax policy imposed by New York under TRARA has the destructive effect of draining the resources of the Commonwealth of Pennsylvania and other states, their local taxing jurisdictions and the people of Pennsylvania and other states surrounding New York. When New York reaches across

state lines -- as it does under TRARA -- to impose taxation based upon income earned by individuals in Pennsylvania and other states who receive no income in New York (i.e., spouses of nonresident New York taxpayers), or to impose taxation based upon income with no connection to New York (i.e., non-New York source income of nonresident taxpayers and their spouses), New York invades the very core of Pennsylvania's and other states' abilities as sovereign states to sustain themselves and the abilities of their local school districts and municipalities to maintain essential human services. Thus, when New York commands a Pennsylvania couple to pay a tax to New York based upon income earned in Pennsylvania or from other non-New York sources, New York not only violates the personal civil rights of the citizens of

Pennsylvania, it erodes the very sovereignty of the Commonwealth.

Third, the New York Tax Law, as amended by TRARA, substantially intrudes into the individual privacy interests of Pennsylvania citizens and their families in a manner deeply offensive to Pennsylvania constitutional law. Through its income reporting requirements, New York trammels upon the basic foundations of the marital relationship of Pennsylvania citizens in which Pennsylvania has the most compelling of interests. The New York Tax Law strikes at the heart of Pennsylvania's constitutionally protected rights of privacy and individuality between married couples who live in Pennsylvania by requiring a New York taxpayer who resides in Pennsylvania to disclose to New York not only his own income but the income of

his Pennsylvania resident spouse. In this way, New York requires Pennsylvanians to disclose information to New York which Pennsylvania itself would not be able constitutionally to require of its own citizens. See Denoncourt v. State Ethics Commission, 504 Pa. 191, 470 A.2d 945 (1983).

C. INTERESTS OF COMITY

By reaching across state lines to include, for tax calculation purposes, Pennsylvania source income -- including the income of Pennsylvanians who have no connection with New York -- New York invites other states to retaliate in a way which substantially undermines the delicate comity among the states. Indeed, retaliation by New Jersey or other states for New York's interstate taxation would

also negatively impact Pennsylvania since such retaliatory legislation would skewer Pennsylvanians as well as New Yorkers who work in New Jersey or in other states which impose retaliatory taxation.

Governor Robert P. Casey of Pennsylvania expressed that very concern when he presented testimony to the United States Congress four years ago. In a statement submitted to the Committee on Finance of the United States Senate on June 13, 1989, Governor Casey said:

> New York's cross-border tax policy has created hostility between the states and raised the specter of retaliatory legislation. If all of the states bordering New York are to provide a full range of services to residents and nonresident-commuters

> alike, unilateral aggrandizement like the New York system must be avoided. In the final analysis, unneighborly attempts to shift the tax burden onto nonresidents can only lead to interstate conflict.

Commuter Tax Moratorium Bill: Hearing on S. 800 Before the Senate Committee on Finance, 101st Cong., 1st Sess. 101 (1990) (statement of Robert P. Casey, Governor of Pennsylvania).

Governor Casey's words are no less true today than they were in 1989. Indeed, under the pressures increasingly placed upon states to raise additional revenues, it would be surprising if retaliatory taxation were not launched in other jurisdictions, such as New Jersey, which have a progressive form of income

taxation.

ARGUMENT

A. STATE COURT PROCEEDINGS

1. Appellate Division

Under section 651(b)(2) of the New York Tax Law, as amended by TRARA, New York required "nonresident taxpayers and their nonresident spouses, like resident taxpayers and their resident spouses, [to] file a joint state income tax return (thereby reporting their aggregate incomes) if they filed a joint federal tax return." Brady v. State of New York, 172 A.D.2d 17, 20, 576 N.Y.S.2d 896, 898 (3rd Dept. 1991) (App. 18a). As amicus curiae in the New York Supreme Court, Appellate Division, the Commonwealth of Pennsylvania

supported the petitioners' claim that section 651(b)(2) denies to nonresidents substantive due process and equal protection under the Fourteenth Amendment to the United States Constitution since it imposes tax obligations to New York upon persons who have no contact with New York.

The Commonwealth of Pennsylvania also joined with the petitioners in New York in arguing that the New York Tax Law violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the United States Constitution since it allows to a New York resident taxpayer married to a nonresident the option of filing either a separate or joint state income tax return, while denying that option to a nonresident New York taxpayer. See Brady v. State of New

York, 172 A.D.2d at 20-21, 576 N.Y.S.2d at 898 (App. 18a).

Finally, Pennsylvania supported the petitioners' challenge to sections 601(d) and (e) of the Tax Law, which require inclusion of non-New York income in New York's income tax calculation as a violation of substantive due process and equal protection.[3]

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[3]In the Appellate Division of the Supreme Court of New York, all parties assumed in their briefs that sections 601(d) and (e) of the Tax Law did not -- independently of the joint filing requirement of section 651(b)(2) -- require a nonresident New York taxpayer to pay income tax to New York based upon his nonresident spouse's income as reported on their joint federal income tax return. Indeed, after the appellate division ruled section 651(b)(2) of the Tax Law to be unconstitutional, the Commissioner of Taxation and Finance announced that a nonresident New York taxpayer would not be required to report his spouse's income or to pay tax based on his spouse's income. Instead, he was allowed to recalculate his federal adjusted gross income as if he had filed

With respect to the issue of spousal income, the Appellate Division of the Supreme Court of New York reached only the petitioners' due process objection to section 651(b)(2) of the New York Tax Law. Striking down the joint filing requirement, the court relied upon this Court's decision in Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954), holding as follows:

> Out-of-state cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power. Thus, we have concluded that

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an individual federal return.

> Tax Law §651(b)(2) violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return solely by reason of the marital relationship and the filing by the couple of a joint Federal income tax return.

Brady v. State of New York, 172 A.D.2d at 22, 576 N.Y.S.2d at 899 (App. 20a).

The New York appellate court did not reach the question of whether a requirement that spousal income be included in the calculation of a nonresident New York taxpayer's income tax liability would violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment or the Privileges and Immunities Clause of the United States Constitution. The court did not reach the other issues

because it concluded that sections 601(d) and (e) do not by themselves reach spousal income. In the opinion of the court, section 651(b)(2) was the sole statutory mechanism for reaching spousal income for tax calculation purposes. The court said:

> The foregoing ruling regarding Tax Law §651(b)(2) renders academic plaintiffs' constitutional challenges to the validity of Tax Law §601(d) and (e) that were based upon the interaction of those sections with section 651(b)(2). The language of Tax Law §601(d) and (e) is "marriage neutral". Once a nonresident spouse having no New York income is no longer obligated to file a joint return, the remaining sections of the Tax Law at issue here are not subject to the objection that they increase a nonresident taxpayer's State tax

> liability on the basis of the non-New York income of that taxpayer's nonresident spouse.

Id. (emphasis added) (App. 20a-21a).

Thus, the Appellate Division of the New York Supreme Court concluded that, without the unconstitutional requirement of section 651(b)(2) that a nonresident spouse of a nonresident New York taxpayer file a joint tax return with her spouse, subsections (d) and (e) of section 601 do not require a nonresident New York taxpayer to include in his individual tax return the income of his nonresident spouse even if the couple had filed a joint federal return.

2. Court of Appeals

New York did not appeal the decision of the appellate division declaring section 651(b)(2) of the New York Tax Law to be unconstitutional. Nor did New York appeal the ruling of the appellate division that subsections (d) and (e) of section 601 do not, independently of section 651(b)(2), require a nonresident New York taxpayer to include in his income tax return the non-New York income of the taxpayer's nonresident spouse. Only the petitioners appealed the appellate division ruling.

The petitioners contended on appeal, as they do in this Court, that sections 601(d) and (e) of the Tax Law are unconstitutional because they require inclusion of non-New York source income of the individual nonresident taxpayer in the tax calculation. However, even though

New York and its executive branch officials did not appeal the appellate division ruling, the New York Court of Appeals overruled the appellate division's interpretation of sections 601(d) and (e). Directly contrary to the opinion of the appellate division, and contrary to the arguments presented by the parties in the lower courts, the court of appeals held that sections 601(d) and (e), independently of section 651(b)(2), do require a nonresident taxpayer to report his nonresident spouse's income to New York and to calculate his tax liability based upon the joint income, regardless of the nonresident spouse's lack of contact with New York.

Thus, under the court of appeals' interpretation of New York law, spousal income is again attached by New York for

income taxation. Reversing his original adherence to the appellate division's ruling, the Commissioner of Taxation and Revenue no longer permits nonresident taxpayers to recalculate their federal adjusted gross income as if they had filed individually rather than jointly.

The court of appeals described the issue simply as "whether in fixing the [state] tax rate, New York can refer to spousal income included in the total adjusted gross income on the couple's federal return ... ." Brady v. State of New York, 80 N.Y.2d 596, 600n.1, 592 N.Y.S.2d 955, 956n.1, 607 N.E.2d 1060, 1061n.1 (1992) (emphasis added) (App. 4a). The court of appeals held that New York's authority to require the reporting of spousal income for purposes of calculating New York income tax liability, regardless

of the spouse's lack of contact with New York, "is unaffected by [the] holding" of the appellate division that section 651(b)(2) requiring joint filing by the spouse is unconstitutional. Id.[4] Therefore, even though New York did not appeal the appellate division determination that sections 601(d) and (e) of the Tax Law do not, without section 651(b)(2), in any way reach the income of a nonresident spouse of a nonresident New York taxpayer, the court of appeals held that sections 601(d) and (e) of the New York Tax Law do provide that New York will determine a nonresident's tax liability by

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[4]The appellate division clearly disagreed with the court of appeals on this issue of statutory construction since the appellate division believed it did not need to address the constitutionality of requiring the inclusion of spousal income in the determination of income tax liability once it struck down the joint filing requirement. App. 20a-21a.

taking into account both the taxpayer's income and the income of his nonresident spouse -- as "determined by reference to the taxpayer's 'federal adjusted gross income' (Tax Law §612[a])." Brady v. State of New York, 80 N.Y.2d at 600, 592 N.Y.S.2d at 957, 607 N.E.2d at 1062 (App. 4a).

With one of the five judges dissenting, the court of appeals rejected each of the arguments made by the petitioners, including the argument that substantive due process does not permit New York to include in the tax calculation of a nonresident taxpayer the separate income of a nonresident spouse who has had no contact with New York. The majority of the court of appeals explained the rationale for New York's tax system as follows:

> A system of progressive taxation apportions the tax burden based on ability to pay -- higher income taxpayers can pay more and are therefore taxed at a higher rate than lower income taxpayers.

Id., 80 N.Y.2d at 605, 592 N.Y.S.2d at 960, 607 N.E.2d at 1065 (App. 10a).

Implicit in the court of appeals' rationale upholding the New York Tax Law is the assumption that a nonresident New York taxpayers' income is defined not simply by his own income, but by the joint incomes of the taxpayer and his spouse. Based on that assumption, New York requires the reporting of the incomes of a nonresident New York taxpayer and his nonresident spouse as the measure of the

nonresident New York taxpayer's "ability to pay" income tax to New York. By implication, New York and its court of appeals has concluded that all marriage partners residing in another state necessarily share their individual incomes with one another and are a single economic entity for purposes of income taxation by New York. New York's assumption as to the unitary status of married couples is evidenced by the court of appeals' statements that "similarly situated taxpayers are those with the same total income," id., 80 N.Y.2d at 605, 592 N.Y.S.2d at 960, 607 N.E.2d at 1065 (App. 10a), and that the joint income of married couples is the true measure of their "ability to pay" New York tax. Id.[5]

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[5]By measuring a couple's "ability to pay" New York tax, the "economic reality" and "practical effect" of New York's taxing scheme is that nonresidents with

B. SECTIONS 601(D) AND (E) OF THE NEW YORK TAX LAW VIOLATE THE DUE PROCESS RIGHTS OF NONRESIDENTS

On its face, sections 601(d) and (e) of the New York Tax Law mandate that every nonresident who derives income from New York file a New York tax return reporting all of the taxpayer's income, from whatever jurisdiction derived. And as now construed by the Court of Appeals of New York, sections 601(d) and (e) also require a non-resident to report as well the income of his nonresident spouse if, for that tax year, the couple has elected

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no connection to New York whatsoever are compelled by "economic realities" to assist their spouses in paying income tax to New York. The practical effect upon the nonresident spouse is that he or she is to pay income tax to New York without having received individually any benefit or protection from New York and without having had any relevant contact with New York.

under federal law to file a joint return with the Internal Revenue Service. Sections 601(d) and (e) then require a nonresident New York taxpayer to pay income tax to New York based upon his total income and the total income of his nonresident spouse.

As construed by the court of appeals, therefore, a Pennsylvania resident who receives some or all of his income from New York, but whose spouse receives all of her income from Pennsylvania sources or other non-New York sources, is nevertheless required by New York law (subject to criminal and civil penalties) to disclose to New York both his entire income and the income of his spouse earned solely outside New York or derived solely from sources outside New York. Then, the New York Tax Law requires that the

nonresident taxpayer pay tax to New York based on both his income and income received solely by his spouse -- income which the taxpayer does not legally own or control, and from which he may not even derive any benefit. New York imposes these filing and payment obligations involving nonresident spousal income solely on the basis that the nonresident couple has filed a joint federal tax return.

Contrary to the limits of due process, the nonresident taxpayer is required to report his nonresident spouse's income and to pay tax based on his spouse's income to New York <u>even if the spouse has had not even one solitary transaction having any contact with the State of New York</u>. Indeed, under the New York Tax Law, the nonresident spouse of

the nonresident New York taxpayer would not even have had to step one foot into New York for the spouse's income to be the subject of the New York disclosure and tax requirements. Yet New York presumes to command a nonresident taxpayer residing in Pennsylvania or another state to pay tax to New York based on the income of another person, his spouse, who has had no contact with New York.

No conceivable argument under the Due Process Clause of the Fourteenth Amendment to the United States Constitution can constitutionally justify New York's overreaching into Pennsylvania to tax the income of Pennsylvania residents based upon the income of the taxpayer's spouse who has had no meaningful or relevant business or contact with New York. Because sections 601(d) and (e), as

construed by the court of appeals, do impose disclosure and tax obligations involving the income of Pennsylvanians and residents of other states who have had no contact with New York, i.e., spouses of nonresident New York taxpayers, the law exceeds the bounds of due process.

As this Court has held:

> If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.

St. Louis v. Wiggins Ferry Co., 11 Wall.

(78 U.S.) 423, 430 (1871) (emphasis added). See also New York, L.E. & W. R. Co. v. Pennsylvania, 153 U.S. 628, 646 (1894). Thus, before New York can require a resident of Pennsylvania to comply with the requirements of its tax laws -- including the requirements of disclosure and taxation of income to New York -- New York must show some relevant "minimal contact" between New York and the person whose income it seeks to reach. National Bellas Hess, Inc. v. Illinois, 386 U.S. 753 (1967); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

Sections 601(d) and (e), as construed by the court of appeals, are clearly an attempt by New York to reach, for taxation, the incomes of Pennsylvania residents and other nonresidents of New York having no contact with New York but

who happen to be married to nonresident New York taxpayers. The New York law disregards the individual contacts of each member of a marital couple domiciled in Pennsylvania and other states. The economic reality and practical effect of the tax is to force a nonresident spouse who is constitutionally beyond the taxing authority of New York to contribute money to her spouse to pay tax to New York. It is no less a tax upon the spouse's income than if New York were to impose a tax directly upon the nonresident spouse, as it attempted to do under section 651(b)(2) before the appellate division ruled the joint filing requirement and liability obligation to be unconstitutional. This is precisely the type of broad, sweeping, extra-territorial tax law which this Court has said is prohibited by due process "as if in conflict with the most explicit

constitutional inhibition." Wiggins Ferry, supra, at 430.

C. NEW YORK TAX LAW INTERFERES WITH PENNSYLVANIA'S RIGHT TO DEFINE THE LEGAL RELATIONSHIPS OF ITS MARRIED COUPLES

In briefs filed in the New York courts, New York and its officials suggested that a nonresident of New York might have contacts with New York, sufficient to justify the imposition of income tax requirements or to require the reporting of joint income, simply "by virtue of the economic benefit derived from the New York income shared by the couple," or some "other [unspecified] contacts" which the nonresident spouse might have with New York (emphasis added). The suggestion of New York and its officials apparently is that New York may presume, in enacting its tax laws, that

married couples domiciled in other states are effectively one economic unit for purposes of the due process clause and that, therefore, New York may reach both of their incomes as the income of one tax entity.

Perhaps, in defining the marital relationship for its own domiciliaries, New York law permits the state to presume such "mutual economic benefit" between spouses. But Pennsylvania, for one, clearly does not presume such a relationship between married couples domiciled in Pennsylvania. It offends both due process and the most basic principles of comity when New York presumes to define and interfere with the economic relationships between spouses domiciled in Pennsylvania in direct contravention of Pennsylvania

constitutional law.

The Supreme Court of Pennsylvania held more than a decade ago that the government may not view spouses domiciled in Pennsylvania as one economic entity. It said:

> Any presumption of identity of interest is based upon the same outmoded social conditions and policy as was the common law legal fiction of unity of person of husband and wife. Judges, like all others, live and work in a real flesh and blood world, tempered by the social and cultural climate of the day... . Experience indicates, and all perceptive individuals inside and outside the legal profession know, that to say ... that husband and wife are one and that their interests are identical is an unmitigated fiction,

> an assumption supported by nothing more than the meager strength of its own weak assertion. This Court cannot and must not disregard the plain fact that spouses are no longer completely dependent upon one another either economically, socially or legally.
>
> ...
>
> Modern conditions demand that courts no longer engage in the automatic and unsupported assumption that one's pecuniary or proprietary interest is identical to that of one's spouse. For many years, parties to a marriage have often pursued independent careers, businesses and vocations... .

Estate of Grossman, 486 Pa. 460, 472-73, 406 A.2d 726, 732 (1979) (emphasis added). See also Denoncourt v. State Ethics Commission, 504 Pa. 191, 470 A.2d 945, 947

(1983).

Pennsylvania's policy of treating married couples as two separate, and socially, economically and legally independent persons, is directly frustrated when New York presumes that all married couples share the economic benefit of their joint income and thereby constitutionally subject both of their incomes to the taxing authority of New York. Comity among the states will not survive long if New York is permitted, in enacting laws affecting married couples in Pennsylvania, to ignore the clear pronouncements of Pennsylvania's highest court in defining the legal relationships of Pennsylvania's married couples. And consistent with the requirements of comity among the states, the due process clause cannot accept such flimsy rationalizations

as New York would proffer to justify the extra-territorial taxation and interference with fundamental rights that sections 601(d) and (e) of the New York Tax Law visit upon the residents of Pennsylvania.

There is also no basis, as New York has professed, which would justify its conclusion that the act of filing a joint federal income tax return expresses the joint and several "desires" of married couples "to be considered as a single taxable unit" by the State of New York or any other state or local taxing jurisdiction. Nor is there any basis for New York's argument that joint filing evidences a married couple's "willingness to be considered for tax purposes as a single taxable unit" by any taxing entity other than the United States. Individuals

are subject to tax by the United States government, and they individually make decisions in complying with federal tax law based upon considerations relating to the taxes imposed and the laws enacted by the United States Congress and the rules, regulations and requirements imposed by the Internal Revenue Service. Under those tax laws, many married couples make the decision to file a joint federal return. In formulating decisions under the tax laws enacted by the federal government to file a joint return with the Internal Revenue Service, married citizens in the United States do not thereby announce to the world their willingness or desire to be treated as a "single taxable unit" by any other jurisdiction or authority which might attempt to subject them to taxation.

There is absolutely nothing in federal statutory or constitutional law -- and New York has cited no authority -- which would permit New York to assume that the filing of a federal joint tax return establishes the "willingness" or "desire" of individuals to be treated by governments, other than the federal government, as a single taxable unit without regard to the individual rights and privileges guaranteed by due process. The filing of a joint federal tax return simply does not constitute a voluntary waiver of individual rights of due process guaranteed by the United States Constitution to be subject to taxation only by those states with whom the individual has had meaningful contact sufficient constitutionally to justify the tax obligation imposed by the state.

The filing of a joint federal tax return also does not diminish in any way the constitutional law of Pennsylvania which precludes the government from treating spouses as one economic entity. A Pennsylvania resident's filing of a joint federal tax return with his or her spouse, who earns or derives income subject to tax in New York, does not create any "contact" with New York which constitutionally could empower New York to reach across state lines to compel the Pennsylvania resident to report his income to New York or to assist his or her spouse in the payment of his New York tax liability. The income earned by a Pennsylvania resident remains his income and is not the income of the Pennsylvania resident's spouse. The filing of a federal joint tax return does not provide any constitutionally relevant connection

between the Pennsylvania resident who has no New York income and the income derived by his or her spouse from New York.

Because the filing of a joint federal tax return creates no "minimal contact" between New York and a Pennsylvania resident sufficient to empower New York constitutionally to cross state lines to impose tax liabilities and obligations upon Pennsylvania residents, sections 601(d) and (e) of the New York Tax Law violate due process.

D. SECTIONS 601(D) AND (E), WHEN COMPARED TO SECTION 651(B)(4), VIOLATE THE PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

Pennsylvania also joins with the petitioners in their objection to the inexplicable favorable treatment received

by residents of New York married to nonresidents compared to New York's treatment of married couples who both reside outside of New York. Section 651(b)(4) of the Tax Law permits a New York resident who is married to a nonresident the option of filing a separate return reporting solely the resident's individual income. At the same time, sections 601(d) and (e) of the Tax Law require a nonresident taxpayer who is married to a nonresident with whom he has filed a joint federal tax return to report their joint income, resulting in a higher rate of taxation. By such disparate treatment that uniformly disadvantages nonresidents married to nonresidents compared to residents married to nonresidents, New York has failed "'to place the citizens of each state upon the same footing with citizens of other

States, so far as the advantages resulting from citizenship in those States are concerned.'" Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64 (1988) (quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1969)).

An example will make the point. Assume two men -- Bob and Steve -- work together at the same firm in New York City and earn the same annual salary of $80,000. Neither has any other significant source of income. Steve resides in New York, while Bob resides in Pennsylvania. Assume further that both Bob and Steve are married to Pennsylvania residents. Bob is married to Amy, and Steve is married to Ruth. Assume further that both Amy and Ruth earn all of their incomes in Pennsylvania and have equal annual incomes of $30,000. Both couples

file a joint federal income tax return. Thus, the two couples' joint incomes are identical -- $110,000 for the year.

Under sections 601(d) and (e) of the New York Tax Law, Bob is required to file a New York tax return disclosing to New York both his individual income of $80,000 earned in New York and the income of $30,000 earned by his wife, Amy, in Pennsylvania. Bob is then required to pay to New York income tax at a rate determined by the joint income of $110,000 the couple reported on their federal tax return. Presumably New York justifies consideration of Amy's income with Bob's income on the unfounded assumption that both Amy's income and Bob's income are necessarily available to Bob to enable him to pay the New York tax which he owes under New York law. According to New

York, the couple's joint income is a better measure of Bob's ability to pay the New York tax which he owes as a result of his employment in New York than the amount of Bob's income alone.

By contrast, under section 651(b)(4) of the Tax Law, Steve is not required as a resident of New York to disclose his wife Ruth's income of $30,000 to New York; and Steve is not required to include Ruth's income in calculating his own tax liability on his income for the year. Thus, because he is a resident of New York, Steve pays income tax to New York at a rate determined solely by his own income of $80,000. By contrast, Bob is required to pay more tax to New York, on the identical amount of individual income as Steve received, based upon the addition of his income and his spouse's income. Thus,

solely because Steve is a resident of New York, he pays a lower rate of tax than Bob on identical incomes. Solely because he is a nonresident, Bob is forced by New York to pay a higher rate of tax on his income than his New York resident co-worker.

On what rationale could New York conceivably require the reporting of Amy's income for New York tax calculation, while the identical income earned by Ruth is beyond the taxing authority of New York? And why is nonresident Bob required to pay tax to New York at a rate higher than resident Steve is required to pay on taxable incomes which are identical, solely because Bob is a nonresident and Steve is a resident? There is absolutely no conceivable rationale for this preferential treatment given to residents

like Steve who have nonresident spouses. New York cannot rationally explain why residents like Steve, who have nonresident spouses, are not presumed by New York to enjoy the mutual economic benefits of their spouses' incomes, as New York apparently presumes to be the case for two nonresidents like Bob and Amy.

Under due process, neither Amy's nor Ruth's incomes earned solely in Pennsylvania should be the subject of New York's tax laws, and their spouses should not be required to report or consider their nonresident spouses' incomes in paying New York's tax. But in any event, under the Privileges and Immunities Clause and the Equal Protection Clause, New York may not treat Bob less favorably than Steve solely because Bob is a nonresident and Steve is a resident. Clearly, New

York does not provide equal treatment when one compares sections 601(d) and (e) with 651(b)(4) of the Tax Law. Therefore, sections 601(d) and (e) are unconstitutional unless the option of individual filing and reporting provided under section 651(b)(4) to residents married to nonresidents were afforded as well to nonresidents married to nonresidents.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the Court of Appeals of New York in order to address the constitutionality of tax laws such as those of New York which ignore state lines, comity and respect for their neighboring states in their attempts to

generate revenue from sources outside their borders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Brief of Amicus Curiae Commonwealth of Pennsylvania and New Hampshire in Support of Petition for Writ of Certiorari to be served upon the following attorneys by United States first class mail, postage prepaid:

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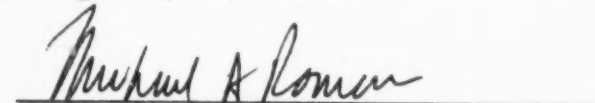

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